No. 2804

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of DAVID JACOBS and ISAAC JACOBS, Copartners doing business as JACOBS BROS.,

Bankrupts,

DAVID JACOBS and ISAAC JACOBS,

Petitioners,

vs.

S. T. HILLS, as Trustee of the Estate of DAVID JACOBS and ISAAC JACOBS, doing business as JACOBS BROS., Bankrupts,

Respondent.

Petition under Section 24b of the Bankruptcy Act to review and revise an order of the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF PETITIONERS.

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BRIEF OF PETITIONERS

STATEMENT OF THE CASE

The petition to review and revise in this case brings up the Findings and Conclusions of the District Judge and the order based thereon entered May 17, 1916, requiring the petitioners to surrender to the

trustee goods, wares and merchandise of the value of $3,199 (R. 44).

The petition of the trustee (R. 11) filed before the Referee and upon which the subsequent proceedings were based, sets forth in substance that on June 2, 1915, an inventory of the stock of the bankrupts was taken by a representative of creditors of the said bankrupts, and at that time the inventory showed merchandise on hand which cost $8,679.99. That for the next two days the bankrupts had possession of the stock and continued their business; that on the 5th day of June, 1915, an attachment was levied by some of the creditors of the bankrupts. The sheriff took possession of the stock and held the same as a species of receiver, selling goods at retail until July 13, 1915, when an adjudication of bankruptcy was made and a receiver was appointed who held possession of the property until August 16th, 1915, on which day the respondent was elected trustee and took possession. He then made an inventory of the property which came into his possession, which inventory showed merchandise which cost $4,590.91. The petition charges that the bankrupts concealed and had in their possession property representing the difference in value between these inventories after making some allowance for goods admitted to have been sold by the bankrupts and the sheriff.

The petition in paragraph No. III (R. 13) also

charges that the concealment of said merchandise by the said bankrupts was part and parcel of an unlawful and fraudulent conspiracy upon the part of the said bankrupts to cheat and defraud their creditors extending over a period of at least one year and that pursuant to said fraudulent conspiracy said bankrupts had operated said store in an extravagant manner calculated to dissipate the assets and had sold considerable merchandise for less than its cost value, and had made false financial statements in writing to sundry creditors and to R. G. Dun & Co. This paragraph, upon motion of the bankrupts, was stricken out by the referee (R. 16) so that there was no issue made thereon which could properly be heard or determined.

The Referee after hearing evidence filed his order (R. 15) finding, from a preponderance of the evidence, that the bankrupts had concealed merchandise of the value of $3,189.00 and that they had failed to render any satisfactory, or any, account thereof and ordered the bankrupts to either turn over and deliver to the trustee merchandise amounting to said sum or to account to the trustee therefor on or before a fixed date.

Both parties filed petitions for review by the District Judge, which were heard at the same time as the hearing on the discharge of the bankrupts and the hearing on another petition of the trustee requir-

ing the bankrupts to turn over to the trustee merchandise of the value of $20,962.41. From the opinion of the District Judge (R. 32), it appears that on the hearing for review the Court not only considered the evidence taken before the referee, but also took into consideration the evidence heard on the other two matters then pending before him.

The Court also entered Findings of Fact and Conclusions of Law (R. 37), in which the Court found substantially the facts as found by the referee in his order, and in addition found in finding No. 10, that the bankrupts had failed and refused to deliver and furnish the trustee any records showing receipts and disbursements and had not kept the books of account contemplated by the bankruptcy act, and also in finding No. 11 that the findings were based on clear and convincing evidence, and the Court was satisfied beyond all reasonable doubt and also that at the present time bankrupts had in their possession the property mentioned and that they were then concealing the same and that he was satisfied beyond all reasonable doubt of the present ability of the said bankrupts to turn over the said assets to the said trustee.

Finding No. nine is as follows:

"That on February 3, 1915, said bankrupts make a statement that they owned and possessed merchandise of the value of $17,642.40, cash on hand $1,098.15. The evidence shows that after February 3, down to the 5th day of June, 1915, they received more than

$10,000.00 worth of merchandise from divers and sundry persons and creditors herein; that between February 3, 1915, and June 5, 1915, the moneys deposited in bank by said bankrupts amounted to $6,-480.59; that the schedules of said bankrupts show merchandise $8,000.00; that February 3, 1915, said bankrupts had a net worth of $19,784.15; that at the time of adjudication schedules show an actual deficit of $9,476.77. The testimony is unsatisfactory as to what disposition was made of said merchandise."

SPECIFICATION OF ERRORS RELIED UPON

I.

That that part of finding No. 11 which finds that your petitioners now have property of the value of Thirty-one hundred eighty-nine ($3,189.00) Dollars belonging to their estate in bankruptcy, is wholly immaterial to, and not involved in, any of the issues raised by the petition.

II.

That that portion of said finding No. 11 which finds that your petitioners now conceal and withhold from the trustee the said property is wholly immaterial and not involved in any of the issues raised by the petition.

III.

That that part of finding No. 11 which finds that the Court is satisfied beyond all reasonable doubt of the present ability of your petitioners, and each of them, to deliver said assets to the trustee, is immaterial and not involved in any of the issues raised by the said petition, and is without warrant of law.

IV.

That findings No. 9 and 10 were wholly immaterial and the facts therein stated were not involved in any of the issues raised by the said petition.

V.

That neither of the conclusions of law nor the order under review made by the said District Judge are justified by the findings of fact herein.

BRIEF OF ARGUMENT

I.

There should have been no finding as to the present ability to perform nor the present possession of property by the bankrupts.

Morehouse vs. Pacific Hardware & Steel Co., 177 Fed. 327.
Power vs. Fuhrman, 220 Fed. 787.
Schmid vs. Rosenthal, 230 Fed. 818.
Epstein vs. Steinfeld, 210 Fed. 236.
In re Ricardilli, 221 Fed. 630.

II.

The findings as to the failure to keep books and the alleged false statements were not properly involved and should not have been made.

III.

The findings do not support the conclusions and order of the Judge.

Black on Bankruptcy, Sec. 229.
Kirsner vs. Tallaferro, 202 Fed. 51.
In re Switzer, 104 Fed. 976.
In re Goldfarb Bros., 131 Fed. 643.

ARGUMENT

I.

The first error relied on is that the Court below found that the bankrupts had the property mentioned in the petition in their possession, not only at the time of the filing of the petition in bankruptcy, but also that this property was in the possession of the bankrupts on the date of the entry of the order and that on that date they unlawfully withheld the same from the trustee in bankruptcy. The contention of the petitioners is, that such a finding is not properly made at this stage of the proceedings, but that the question of fact considered thereby becomes material only on the hearing of a proceeding for contempt for failure to obey the order now under review.

At first glance, it may seem to be of slight importance whether the question of the present ability of the bankrupts to satisfy the order is determined at the hearing on the petition of the trustee to turn over property, or in a contempt proceeding for failure to obey an order entered on such petition. In view of the holdings of this Court, the distinction, however, becomes of extreme importance. Upon the decision of this Court upon this question depends the right of the bankrupts to have this Court review a finding of fact in such a proceeding before, perhaps, they may be committed to jail.

In *Morehouse vs. Pacific Hardware & Steel Co.*,

177 Fed. 327, this Court held that the only method of reviewing an order of the District Court requiring a bankrupt to turn over property to its trustee, was by petition to review and revise under Sec. 24b of the Bankruptcy Act, and that no appeal lay from such an order. Since said decision, this has been the settled rule in this district. A petition to review carries with it no right to have the facts examined. Accordingly, when the District Court enters an order requiring a bankrupt to turn over money or property to his trustee with Findings of Fact, those findings are binding upon this Court in its review of such order.

Until the decision of *Power vs. Fuhrman,* 220 Fed. 787, it was believed that on a contempt proceeding, the question of the fact as to the present ability of the bankrupt to comply with an order to turn over might be raised again and heard in the court below. In that case, the District Court at the time of ordering the bankrupt to turn over, found, as it did in the case at bar, that the bankrupt had the present ability to perform. The order was never carried to this Court for review. When the contempt proceeding came before this Court, the Court said: "The judgment of the Court below, not having been appealed from or otherwise questioned by either of the respondents, established that at the date of its entry, July 23, 1913, the money in question was in the actual possession and under the control of the said bankrupt and his said

wife, and was then being by them fraudulently concealed and withheld from the creditors of the bankrupt."

So if in this case the bankrupts should fail to comply with the terms of the order under review and it was sought to enforce obedience to that order by contempt proceedings, the present order and its findings would be conclusive against these petitioners and they would be barred from having the judgment of this Court upon the question of their guilt.

This specification of error is not without authority. The only Circuit Court of Appeals which has passed on the question specifically is the Third Circuit. In that Circuit there is now a settled line of authority that on the hearing of a petition to turn over, the only question to be determined is whether the property was in the possession of the bankrupt at the date of the filing of the petition in bankruptcy. The last expression of that Court is *Schmid vs. Rosenthal,* 230 Fed. 818, in which the Court says: "Some confusion seems to exist in the minds of counsel concerning the effect of the order below, and we may say a few further words to make the situation clear. This is not a proceeding to punish for contempt. The controversy has not yet reached that stage. Nothing has been done thus far except to ascertain what sum of money the bankrupt should have accounted for at the time of the adjudication, and should have turned over

to his trustee afterwards. The practice was definitely settled by the decision in *Epstein vs. Steinfeld* (followed in *Re Pennell,* 214 Fed. 341), and with a slight modification the referee's finding will conform to that decision. The finding should have been restricted to the date of bankruptcy, and should therefore be modified by striking out the words 'And now has in his possession' and by substituting therefor the words 'At the time the petition in bankruptcy was filed.' "

See also:

Epstein vs. Steinfeld, 210 Fed. 236.
In re Ricaradelli, 221 Fed. 638.

An examination of the record and particularly the opinion issued by the District Judge (R. 32) will show clearly that this desire to have these facts reviewed by this Court is not an idle one. The opinion shows and the findings of fact show that the decision in this case was based on not only the evidence offered on the petition of the trustee, but that matters and things not mentioned in that proceeding, but heard on the question of the discharge, were also considered by the Court. These petitioners insist on their undoubted rights, to have this question, one which, if decided against them, may result in their imprisonment for an indefinite period, decided according to the evidence heard upon it, and without reference to what the Court may have heard or gathered from some other pro-

ceeding, and to be in a position to present to this Court on review the facts upon which it is sought to punish them.

II.

The petition upon which this whole proceeding is based, found on page 11 of the record, contained, when filed, paragraph III (R. 13), which contained some very general and loose averments, that the matters complained of were the result of a fraudulent conspiracy; that the bankrupts had made false statement in writing to their creditors and sold valuable property for nothing. This paragraph was stricken by the referee before the hearing (R. 16). Notwithstanding this fact, we find that findings of fact Nos. 9 and 10 (R. 14) are based solely upon this issue, which was stricken from the petition.

It is a remarkable situation when a petition is filed containing charges which are stricken from it before the hearing, that the Court in deciding that petition makes findings on the stricken charges. These findings, as shown in *Power vs. Fuhrman, supra,* are conclusive upon the bankrupt in any hearing, or, at least, in any civil hearing.

Shall they be compelled to submit to findings such as these, made without a charge of that kind against them, when they were not in issue and when no evidence can properly be received upon them? It seems to us that the mere statement of this situation is suffi-

cient without argument to demonstrate that, as to these findings, there should be a reversal of the Court below.

III.

If we omit findings Nos. 9 and 10, we find, from an inspection of the findings, that in reality what the Court did was to find that on June 2nd, according to the inventory taken by Mr. Stevens, there was merchandise on hand in the sum of $8,679.90; that on August 16, at the time of the inventory taken by the appraisers $4,590.91, and that making allowance for all that it is claimed was sold during the time, there is a shortage of $3,189.00. As a matter of fact, taking findings 1 to 8, this is all the Court found. Finding No. 11, viewed properly, is nothing but a conclusion of law. Looking at the findings as a whole, it is manifest that No. 11 is nothing but a general conclusion of the Court from the previous findings.

In considering whether these first eight findings justify the holding that the bankrupts have concealed the property in question, it should be borne in mind that, according to the findings, this property was in their possession for only two days, to-wit, the 3rd and 4th of June, subsequent to the taking of the first inventory. On the 5th of June, 1915 (R. 39), the property was taken possession of by the sheriff and from that time on remained in the custody of the law. In other words, in a total of seventy-five days between the first and second inventory, the bankrupts had pos-

session for two and it is to be presumed that in those two days they took $3,100 worth of merchandise from their store, and the proof thereof is so slight and so slender that the Court when it entered this order under review, finds in finding No. 9 (R. 42) "That the testimony is unsatisfactory as to what disposition was made of this merchandise."

If there is any provision of law definitely established in this class of cases, it is that the withholding of the property must be shown absolutely and clearly before any order will be entered.

Black on Bankruptcy, Sec. 229.
Kirsner vs. Tallaferro, 202 Fed. 51.
In re Switzer, 104 Fed. 976.
In re Goldfarb Bros., 131 Fed. 643.

In this case we have a finding that the testimony is unsatisfactory and immediately following it, a finding (Finding of Fact No. 11) that the Court is satisfied beyond all reasonable doubt as to what disposition was made of the merchandise. This necessarily follows, because the Court finds that it is satisfied beyond all reasonable doubt that the bankrupts have concealed it, and is satisfied beyond all reasonable doubt that they are now concealing it and that they now have it in their possession. If the testimony is unsatisfactory, by what method of reason can we have the Court satisfied beyond all reasonable doubt?

It is respectfully submitted that this record shows that this question, so far as it concerns the bankrupts, has been decided, not on the record made, but on evidence taken in every sort of proceeding in this bankruptcy; that the order should be reversed and an opportunity given to try the case on the issues raised by the petition, or as modified by the referee, unaffected by anything the Court may have heard in any other matter, or in any event that the order should be so modified that these petitions will be able to present the question of their present ability to perform, and have that considered, determined and passed upon, if necessary, by this Court.

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